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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1051

KERNEL HUGHES, ET AL.,
Petitioners,

vs.

ALBERTO BALLI, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS AND BRIEF IN SUPPORT OF APPLICATION

BEN D. CLOWER,
BASCOM GIST,
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Counsel for Petitioners.

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ALBERTO BALLI, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

Short Statement of the Case

To the Honorable the Supreme Court of the United States:

This is an action on three counts by the State of Texas to recover the title and possession of the whole of Padre Island, or, in the alternative, an undivided interest in it, these petitioners holding mineral rights in and under said land emanating from the State of Texas. The suit was filed by petitioner against the King Ranch and the Estate of Robert J. Kleberg, Dec'd, Sun Oil Company, Sinclair Prairie Oil Company, Gilbert Kerlin, the Estate of Pat F. Dunn, Deceased, and about two hundred (200) other defendants. Padre Island, the largest island in Texas, is one

hundred and ten (110) miles long, consisting of 135,213 acres of land. It lies along the southeast coast of Texas between the Nueces River, which empties into Nueces Bay at Corpus Christi, Texas, and the Rio Grande, which empties into the Gulf of Mexico, near Brownsville, Texas. The case was tried before the District Court of Nueces County, Texas, without a jury, and judgment was entered on March 30, 1942, denying all relief to the State. Hector Crandall and Kernal Hughes, et al., whose respective applications for a mineral lease on Padre Island from the State had been denied by the Commissioner of the General Land Office of Texas, intervened as plaintiffs. Their prayers for relief were likewise denied. This judgment was appealed to the Court of Civil Appeals at San Antonio, Texas, and that Court on June 23rd, 1943, entered its judgment affirming the judgment of the trial Court. The opinion of the Court of Civil Appeals is reported in 173 S. W. (2d) 522-544. On November 3, 1943, the Supreme Court of Texas granted a writ of error and on December 20, 1944, judgment was entered (R. 255) affirming the judgment of the Court of Civil Appeals, with one justice dissenting. A motion for rehearing, with several supporting briefs, was filed by petitioner and on November 7, 1945, the Court overruled the motion for rehearing (R. 392 with dissenting opinions by the three regularly elected justices. On September 21, 1945, six new members had been sworn in as justices of the Supreme Court of Texas, pursuant to a constitutional amendment, which was adopted August 25, 1945. The six justices who overruled the motion for rehearing had been non-voting commissioners at the time the original opinion was handed down on December 20, 1944. The majority and minority opinions are reported in — Tex. —, 190 S. W. (2d) 71, 101. The time for filing the application for certiorari was extended to the 3rd day of April 1946 by order of this Court entered the 15th day of January 1945.

Basis of Jurisdiction

This Court has jurisdiction under Section 2, Article III of the Federal Constitution and Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 344, b) because,

1. The title of the State of Texas to Padre Island claimed under the first and second sections of a joint resolution of Congress of March 1, 1845 (5 Stat. at L. 797), being part of the Annexation Agreement between the United States and the Republic of Texas, is denied. Sections 1 and 2 of the joint resolution read as follows:

> "1. Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress doth consent, that the territory, properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union.
>
> "2. And be it further resolved,—That the foregoing consent of Congress is given upon the following conditions, and *with the following guarantees*, to wit: First, Said State to be formed, subject to the adjustment by this government, of all questions of boundary that may arise with other governments; and the Constitution thereof with the proper evidence of its adoption by the people of said Republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress for its final action, on or before the first day of January, one thousand eight hundred and forty-six. Second, Said State, when admitted *into the Union*, after ceding to the United States all public edifices, fortifications, barracks, ports and harbors, navy and navy yards, docks, magazines, arms

> and armaments, and all other property and means pertaining to the public defence belonging to the said Republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing to the said Republic; and *shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands after discharging said debts and liabilities, to be disposed of as said State may direct;* but in no event are said debts and liabilities to become a charge upon the government for the United States. Baschal's Dig., Laws of Texas, p. 44.

This proposal was accepted by the Republic of Texas by joint resolution of its Congress of June 23rd, 1845 (2 Gammel's Laws of Texas, 1225-1227, Paschal's Dig., Laws of Texas p. 45, Sayles' Early Laws of Texas, Art. 1531), and by the People of the Republic by their deputies in a convention assembled for the purpose by an ordinance of July 4, 1845 (1 Gammel's Laws of Texas 1228-1230, Paschal's Dig. p. 45). The United States confirmed the agreement and admitted Texas into the Union on an equal footing with the original states in all respects by a joint resolution of Congress of December 29, 1845. 9 Stat. at L. 108, Paschal's Dig., Laws of Texas p. 46. The State of Texas asserted its ownership and control over said lands by joint resolution of its Legislature of April 29th, 1846. 2 Gammel's Laws of Texas, 1461, Paschal's Dig., Laws of Texas, Art. 441.

2. The judgment of the Supreme Court of Texas has misconstrued and misapplied the Treaty of Guadalupe-Hidalgo between the United States and Mexico, which was concluded on the 2nd day of February, 1848, by holding that it is applicable to the land in suit. The portions of the Treaty involved here read as follows:

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[1] The several joint resolutions forming the Annexation Agreement are all copied in full in the Appendix.

"Article VIII

"*Mexicans now established in territories previously belonging to Mexico,*[2] and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.

"Those who shall prefer to remain *in the said territories* may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States, But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain *in the said territories* after the expiration that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

"*In the said territories,* that property of every kind, now belonging to Mexicans not established there shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States." 9 Stat. at L., 929, 930.

3. The Supreme Court of Texas has held invalid under Federal Law a statute of the State of Texas of August 15, 1870 (6 Gammel's Laws of Texas, 375, 378) which, under the undisputed facts in this case, would bar the respondents from asserting any right or title to Padre Island. The material portions of this Statute read as follows:

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[2] Land in Texas in 1848 previously belonged to the *Republic* of Texas, and was not "territories previously belonging to Mexico."

"Section 1. Be it enacted by the Legislature of the State of Texas, That any person who may be the original grantee, heir, or legal assignee of any grant of land, emanating from the Spanish or Mexican government, and having its origin previous to the nineteenth day of December, A.D. 1836, and situated between the Nueces and Rio Grande rivers, and below a line drawn from the northern boundary of Webb county to the mouth of the Moros creek, emptying into the Nueces river, may file a petition to the District Court of the county of Travis, or where the capitol of the State may be; which petition shall be filed at least ten days before the time of holding of said District Court, and shall contain a full description of the land claimed, setting forth particularly its situation, boundaries and extent, and shall accompany such petition with the titles or evidences of titles or right under which the same is held or claimed; and the said District Court shall investigate the same in accordance with the laws of nations, the laws, usages and customs of the government from which the claim is derived, and the principles of equity, so far as the same are applicable, and shall give judgment for the confirmation of the same when the title is perfect; and when imperfect, when the same would have been matured into a perfect title under the laws, usages and customs of the government under which it originated, had its sovereignty over the same not been passed to and been vested in the Republic of Texas; provided, said title or right was originally founded in good faith; and provided, that no service of such petition shall be necessary."

"Section II. Be it further enacted, That all claimants under the act of February 10, 1852, and under the act of February 11, 1860 and all claimants to grants which may be confirmed by the courts under this act, shall have their land surveyed and the field notes returned to the General Land Office by the first day of January, A. D. 1875, or their claims shall be forever

barred and such lands shall become part of the public domain of the State."[3]

5. The Supreme Court of Texas has held invalid under Federal Law Section 8, Article 14 of the Texas Constitution, which, under the undisputed facts of this case, would bar the respondents from asserting any right or title to Padre Island. This section of the Texas Constitution, which has not been amended since it was adopted in 1876, reads as follows:

> "Persons residing between the Nueces River and the Rio Grande, and owning grants for lands which emanated from the government of Spain, or that of Mexico which grants have been recognized and validated by the State by acts of the Legislature, approved *February 10, 1852, August 15, 1870,* and other acts, and who have been prevented from complying with the *requirements of said acts* by the unsettled condition of the country, *shall be allowed until the first day of January 1880, to complete their surveys, and the plats thereof, and to return their field notes to the General Land Office; and all claimants failing to do so shall be forever barred;* provided, nothing in this section shall be so construed as to validate any titles not already valid, or to interfere with the rights of third persons."

Questions Presented

The following Federal Questions are presented in this case:

I

Texas claims the title to 19 leagues (83,132 acres) on Padre Island as the successor to the Republic of Texas, which acquired title in 1836 from the Mexican State of

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[3] The predecessors ni title of respondents were "claimants under the act of February 10, 1852" but they did not comply with this statute or with section 8, Article 14 of the Texas Constitution.

Tamaulipas by virtue of the Texas Revolution. Texas entered the Union in 1845 under an Annexation Agreement between the United States and The Republic of Texas, to which Texas as a state and the people of Texas became parties. The respondents claim title to Padre Island by virtue of proceedings which Nicholas and Juan José Balli, their predecessors in title, had with the State of Tamaulipas, Mexico, in 1827-30, and by virtue of an act of the Texas Legislature in 1852 which confirmed to Nicolas Grisante and José Maria Tovar, also their predecessors in title, 11½ leagues in Cameron County, Texas, called "Padre Island,"[4] The petitioner admits the confirmation act of 1852 but contends that, (1) the original title issued by the State of Tamaulipas in 1827-30 was void because it was not approved by the Chief Executive of Mexico as was required of all grants to lands lying within ten leagues of the coast. The respondents, therefore, have title only to 11½ leagues on the Island, the title to which was confirmed by the Texas Act of 1852. (2) Padre Island has since 1827-30 contained over 30 leagues of land and the National Colonization Law of Mexico of August 18, 1825, which governed the proceedings in 1827-30, limited the amount of land which could be granted to a single individual to six leagues. The grant to the Ballis, therefore, could not have been for more than twelve leagues. (3) The title papers from the State of Tamaulipas, Mexico to the Ballis describe the land which the Ballis applied to purchase, which was surveyed for them and which was paid for by them, as 11.15 leagues of pasture land and not an entire island. This corresponds with the 11½ leagues of pasture land called "Padre Island," the title to which was confirmed by the Texas Legislature in 1852. The petitioner

[4] The portion of the Confirmation Act of 1852 applicable here is copied in the Appendix.

claims title to the balance of the Island, consisting of 19 leagues (83,132 acres) of flats, sand dunes and salty bays, which have become very valuable because of oil development.

A. It is necessary for this Court to ascertain the quantity of land, if any, which was conveyed to the Ballis by the State of Tamaulipas, as evidenced by the several instruments included in the Instructive Dispatch, a complete copy of which is in the record (R. ——), in order to determine whether the Annexation Agreement applies to any part of Padre Island. Three members of the Supreme Court of Texas, who alone constituted the Court until it was enlarged by Constitutional amendment adopted on August 25, 1945, say that *only* 11.15 leagues on Padre Island were granted to the Ballis by the Mexican government. Six members of the Court, who were non-voting Commissioners appointed by the Court and not members of the Supreme Court at the time the original opinion was handed down, hold that the instruments in the Instructive Dispatch had the effect under Mexican Law of conveying to the Ballis the whole of Padre Island, consisting of 30½ leagues (135,213 acres). If the dissenting opinions are correct, Texas is being deprived of 83,132 acres of land to which she is enttiled under guaranties by the United States as expressed in the Annexation Agreement.

B. The question also arises as to the construction and application of the provisions of Mexican law which prohibited the sale of land within ten leagues of the coast, without the previous approbation of the Chief Executive of Mexico. Under this contention the "grant" would be void when issued regardless of the area called for, but it was later validated to the extent of 11½ leagues by the Texas

act of February 10, 1852 (copied, p. — above.) provisions were:

(1) Article 4, Decree 72, of the National Colonization Law of Mexico of August 18th, 1824 (1 Gammel's Laws of Texas, 39, Sayles' Early Laws of Texas, Article 40), which provided,

> "There cannot be cononized any lands, comprehended within twenty leagues of the limits of any foreign nation, *nor within ten leagues of the coast*, without the previous approbation of the general supreme executive power."

(2) Article 11 of Colonization Law of Tamaulipas of December 15, 1826 (1 Gammel's Laws of Texas, 455, Sayles' Early Laws of Texas, Article 89) which provided:

> "Art. 11. In the same manner he shall take care that no town projected by foreigners be situated within ten leagues upon the coast of the Gulf of Mexico within the limits of the State, without previously obtaining the consent and approbation of the Supreme Executive of the Union. Beyond said line he shall also take care that, so far as the sites permit, the new towns be established in contact with the present ones, and with the conditions he stipulates with the empresaries."

C. The question also arises as to the construction and application of the laws of Mexico limiting the quantity of land which could be held by one individual. These provisions were,

(1) Art. 12, Decree No. 72, of the National Colonization Law of Mexico of August 18th, 1824, (1 Gammel's Laws of Texas, 98, Sayles' Early Laws of Texas, Art. 40), which provided,

> "Art. 12, It shall not be permitted to unite in the same hands with the rights of property, more than one league square of land, suitable for irrigation, four square

leagues in superficies, of arable land without the facilities of irrigation, and *six square leagues in superficies of grazing land.*"

(2) Art. 25, of the Colonization Law of Tamaulipas of December 15, 1826 (1 Gammel's Laws of Texas, 458, Sayles' Early Laws of Texas, Art. 89) which provided;

> "Art. 25, The Chief Executive shall convoke those born in the republic for the occupation of vacant lands, who shall be preferred to foreigners in the order of the older date of the designations, and, in case of equality, the natives or inhabitants of the place to which the land designated belongs, shall have the first place, those of places within the state the second, *and adjudication may be made up to the amount of one hundred and twenty-five million square varas.*" [5]

II

It is necessary for this Court to ascertain whether the Sovereign was entitled to accretions on the seashore under the Laws of Tamaulipas, Mexico, in order to determine whether the Annexation Agreement applies to this part of Padre Island. The majority opinion correctly holds "that the rights of the State and respondents must be determined in the light of the civil law in effect at the time of the grant as it existed in the State of Tamaulipas" (R. ——). If, under the Spanish Civil law, which was in force in Tamaulipas in 1827-30, the accretions on the seashore belonged to the sovereign, as stated by Mr. Justice Sharp in his dissenting opinion (R. 354), the accretions which have formed on Padre Island are "vacant and unappropriated lands" and belong to Texas under the Annexation Agreement. This is true, regardless of whether the so-called "grant" from the State of Tamaulipas to Nicholas and Juan José Balli

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[5] Five leagues.

included the whole of Padre Island or only 11.15 leagues of land on Padre Island.

III

The Supreme Court of Texas has misconstrued and misapplied the Treaty of Guadalupe-Hidalgo by holding that it is applicable to Padre Island. This Court in *Elisha Basse* v. *City of Brownsville, Texas,* 154 U. S. 610, 22 L. Ed. 420, dismissed an application for a writ of error to the Supreme Court of Texas on the ground that;

> "In McKinney vs. Saviego, 18 How., 240 (59 U. S. X. V. 367), it was decided that the Treaty of Guadalupe-Hidalgo had no relation to property included within the State of Texas."

IV

The Supreme Court of Texas misconstrued and misapplied the Treaty of Guadalupe-Hidalgo (1848), paragraph 2 of Article 6 of the Federal Constitution, and the Fourteenth Amendment to the Federal Constitution by holding, in effect, that, under their provisions, section 11 of the Texas Act of August 11, 1870 (Copied, p. — above) was invalid. The majority opinion (R. 294) mentions this statute in connection with the act of February 10, 1852, and Section 8 of Article 14 of the Texas Constitution and strikes the three down with one fell swoop. The majority opinion did not try to "construe" this act as it did the others, apparently because the meaning is too obvious, and it did not hold this act invalid under the Texas Constitution. The only grounds of invalidity relied on by the Court are Federal grounds, and we must presume that the Court refused to apply and give effect to the statute for that reason only. This Statute was invoked and relied on by petitioner in exceptions to the admission of evidence in the trial court (R. —) and in the Court of Civil Appeals (R. —).

V

The Supreme Court of Texas misconstrued and misapplied the Treaty of Guadalupe- Hidalgo, paragraph 2 of Article 6 of the Federal Constitution, and the Fourteenth Amendment to the Federal Constitution by holding that, under their provisions, Section 8 of Article 14 of the Texas Constitution (copied, p. 7, *supra*) cannot be enforced if its language is read in the sense in which it would ordinarily be understood and that it must be given a narrow and strained "construction" for that reason.

VI

The Supreme Court of Texas misconstrued and misapplied the Treaty of Guadalupe-Hidalgo, paragraph 2 of Article 6 of the Federal Constitution and the Fourteenth Amendment to the Federal Constitution by holding that Texas, by reason of these provisions lacked the power to require by reasonable regulation, upon condition of forfeiture, that the claimants to Mexican or Spanish grants between the Nueces River and the Rio Grande, whose claims had been validated, complete their surveys and identify their lands within four years in order that the amount of public domain might be accurately ascertained.

Reasons for Granting the Writ

This is the first time this Court has been called upon to construe and apply the Annexation Agreement between the United States and the late Republic of Texas. This is the first time that the State of Texas, as the successor to the Republic of Texas, has applied to this Court for help in retaining the public domain which the United States guaranteed to it under the terms of said Annexation Agreement.

This is the first time that the Supreme Court of Texas

has held that Texas was not entitled under Mexican grants to accretions on the seashore. This ruling is of tremendous importance to Texas since most of its 380 mile coast is held under Civil Law grants, which were issued before the Common law was adopted in 1840. This holding is not in accord with the holding of this Court in *Ker and Co.* v. *Couden,* 223 U. S. 268.

The holding of the Supreme Court of Texas that the previous approbation of the chief executive of Mexico was not necessary under Mexican Law to the validity of grants within ten leagues of the coast is not in accord with the holding of this Court in *Christy* v. *Pridgeon,* 71 U. S. 204.

The erroneous construction of the Balli grant in the majority opinion of the Supreme Court of Texas has the effect of including more land in the grant than was originally intended by the Mexican government and presents a federal question of substance by reason of the guarantees which the United States gave to the people of Texas in the Annexation Agreement. This holding is not in accord with the holding of this Court in *Ely's, Admr.* v. *United States,* 171 U. S. 220.

The Supreme Court of Texas has decided a federal question of substance by holding that the State of Texas was without power, under the Treaty of Guadalupe-Hidalgo and the Federal Constitution, to provide for a forfeiture of Mexican grants lying between the Nueces River and the Rio Grande where the claimants failed and refused, after their claim had been validated, to have their lands surveyed and to file their plats and field notes in the General Land Office of Texas. This holding is not in accord with the holding of this Court in *Barker* v. *Harvey,* 181 U. S. 481.

The holding of the Supreme Court of Texas that the Respondents were protected under the Treaty of Guadalupe-Hidalgo in their claims to Padre Island is in conflict

with the holding of this Court in *Elisha Basse* v. *City of Brownsville, Texas,* 154 U. S. 610, 22 L. Ed. 420. The United States District Court for the Southern District of Texas has recently held in *Amaya et al.* v. *Stanolind Oil and Gas Co.,* 62 F. Supp. 181, that the Treaty of Guadalupe-Hidalgo is not applicable to land between the Nueces River and the Rio Grande, which land was in the former State of Tamaulipas, or to any land in the present State of Texas, on the basis of the holding of this Court in the *Basse* case. As this question of whether or not the federal treaty is applicable is of tremendous importance, particularly to the large ranchers in Texas whose titles, in many instances, are dependent solely on Mexican grants, the conflict between the holdings of the State Courts and Federal Courts on this point should be settled.[6]

WHEREFORE, petitioner prays for a writ of certiorari to the Supreme Court of Texas, directing it to certify to this Court for review and determination the record and proceedings in Cause No. 8187, styled the State of Texas, Et Al., Petitioners, vs. Alberto Balli, Et Al., Respondents, on the docket of that Court and upon hearing that judgment be here entered in favor of petitioner for title and possession of Padre Island or in the alternative, for 19 leagues of land on the island, and in any event, for the accretions on Padre Island, or in the alternative, that the judgment below be reversed and the cause remanded, and petitioner prays for its costs.

Respectfully submitted,

BEN D. C. CLOWER,
BASCOM GIST,
MURPH WILSON,
Counsel for Petitioner.

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[6] As historical background for this point, as well as others, we have copied in the appendix Article 88 of Sayles' *Early Laws of Texas.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1051

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vs.

ALBERTO BALLI, ET AL,
Respondents

BRIEF IN SUPPORT OF THE APPLICATION FOR WRIT OF CERTIORARI

Now come Kernel Hughes, F. P. Dayvault, R. B. Hoover, Emory Wiley, Ben B. Scott, Glenn O. Brisco, Wright Titus, J. A. Bracken, Neal Powers, Sam J. Kline, Arthur Squyres, C. C. Crews, P. H. Lipstate, W. M. Smith, S. H. Casteel, A. M. Hendrickson, Petitioners for Writ of Certiorari, and adopted the brief of the State of Texas filed herein in the matter of the State of Texas, Petitioners vs. Alberto Balli, et al, Respondents, No. 1049 in the Supreme Court of the United States October Term 1945.

Respectfully submitted,

Ben D. C. Clower,
Bascom Gist,
Murph Wilson,
Counsel for Petitioners.